

**IN THE UNITED STATES COURT OF FEDERAL CLAIMS**

## OFFICE OF SPECIAL MASTERS

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**JEFF KAY and PAMELA KAY,** \*  
Parents of MASON KAY, a Minor, \*  
 \*  
Petitioners, \*

No. 08-607V  
Special Master Christian J. Moran

V. \*

Filed: June 22, 2009

SECRETARY OF HEALTH AND HUMAN SERVICES,

Respondent.

Interim award of attorneys' fees and costs, amount which is not disputed.

\* \* \* \* \*

Andrew D. Downing, Rhodes, Hieronymus, et al., Tulsa, OK, for petitioners;  
Chrysovalantis P. Kefalas, United States Dep't of Justice, Washington, D.C. for respondent.

## UNPUBLISHED RULING ON INTERIM ATTORNEYS' FEES AND COSTS\*

Jeff Kay and Pamela Kay alleged that a dose of the diphtheria-tetanus-acellular pertussis (DTaP) vaccine caused their son, Mason, to develop a seizure disorder. The Kays seek compensation pursuant to the National Vaccine Compensation Program, 42 U.S.C. § 300aa-10 et seq. (2006).

Whether the Kays are entitled to compensation has not been determined. Nevertheless, the Kays filed a motion seeking an interim award of attorneys' fees and costs. Such a request is permitted in the Vaccine Program. Avera v. Sec'y of Health & Human Servs., 515 F.3d 1343 (Fed. Cir. 2008). Unlike most fee-shifting statutes, which require a party to prevail as a

\* Because this unpublished decision contains a reasoned explanation for the special master's action in this case, the special master intends to post it on the United States Court of Federal Claims's website, in accordance with the E-Government Act of 2002, Pub. L. No. 107-347, 116 Stat. 2899, 2913 (Dec. 17, 2002).

All decisions of the special masters will be made available to the public unless they contain trade secrets or commercial or financial information that is privileged and confidential, or medical or similar information whose disclosure would clearly be an unwarranted invasion of privacy. When such a decision or designated substantive order is filed, a party has 14 days to identify and to move to delete such information before the document's disclosure. If the special master, upon review, agrees that the identified material fits within the banned categories listed above, the special master shall delete such material from public access. 42 U.S.C. § 300aa-12(d)(4); Vaccine Rule 18(b).

prerequisite for an award of fees, the Vaccine Act permits an award of attorneys' fees and costs to unsuccessful petitioners when the petition had a reasonable basis and was brought in good faith. 42 U.S.C. § 300aa-15(e) (2006). The Kays request requires resolution of a series of three questions: (1) whether the Kays have established that they are entitled to any award of attorneys' fees and costs, (2) if so, whether the Kays have established that they are entitled to an award of attorneys' fees and costs on an interim basis, and (3) if so, the amount of the award.

Before the Kays filed their motion for an interim award of attorneys' fees and costs, the Kays had filed a complete set of medical records. The Kays also supported their claim for compensation by filing reports from experts, who opined that the vaccine caused Mason's seizure disorder. Respondent has not challenged that Kays have a reasonable basis in pursuing this claim. Respondent also has not challenged that the Kays have acted in a good faith. During an unrecorded status conference, respondent conceded that the Kays had established these two factors. Under these circumstances, it is found that the action is supported by a reasonable basis and the Kays are acting in good faith.<sup>1</sup> Thus, the Kays have established that they are entitled to an award of attorneys' fees and costs.

The next question is when the Kays should receive an award of attorneys' fees and costs. The Kays request an award on an interim basis. However, respondent objects on the ground that the Kays have not shown "undue or substantial hardship." Resp't Resp., filed April 7, 2009, at 1.

Respondent's argument is not persuasive. The amount of money requested, approximately \$50,000, is not a small amount of money. The Kays' request to receive an award on an interim basis is reasonable. See Broekelschen v. Sec'y of Health & Human Servs., No. 07-137V, 2008 WL 5456319 \*2 (Fed. Cl. Spec. Mstr. Dec. 17, 2008).

The final question is the amount to which the Kays are entitled. On this issue, it appears that the parties have attempted to compromise. The Kays reduced the amount requested for attorneys' fees and costs and the respondent has not objected to the reduced amount. This cooperation is greatly appreciated. The amounts requested appear reasonable.

**The Kays are awarded \$33,722.50 in attorneys' fees and \$16,706.50 in costs.** Petitioners are entitled to an award of interim attorneys' fees and attorneys' costs. The special master determines that there is no just reason to delay the entry of judgment on interim attorneys' fees and attorneys' costs. Therefore, in the absence of a motion for review filed pursuant to RCFC Appendix B, the clerk of court shall enter judgment in petitioners' favor for **\$50,429.00** in interim attorneys' fees and attorneys' costs. Pursuant to Vaccine Rule 11(a), the parties may expedite entry of judgment by filing a joint notice renouncing the right to seek review.

IT IS SO ORDERED.

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<sup>1</sup> This finding, of course, does not suggest anything about whether the Kays ultimately will demonstrate that they are entitled to compensation.

s/Christian J. Moran

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Christian J. Moran  
Special Master